INDEX

CITATIONS

872-984—70——1

Cases—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 230

H. K. PORTER COMPANY, INC., DISSTON DIVISION—DANVILLE WORKS, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD AND UNITED STEELWORKERS OF AMERICA, AFL–CIO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The order of the court of appeals enforcing the Board's supplemental order is set forth at A. 140–141. The earlier opinions of the court of appeals are reported at 363 F. 2d 272, certiorari denied, 385 U.S. 851, and 389 F. 2d 295 (A. 55–78, 114–130). The Board's decisions and orders are reported at 172 NLRB No. 72, and 153 NLRB 1370 (A. 43–56, 132–137).

JURISDICTION

The judgment of the court of appeals (A. 140–141) was entered on April 22, 1969. The petition for a writ of certiorari was filed on June 13, 1969, and was granted on October 13, 1969 (A. 142). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the National Labor Relations Board, upon finding that the employer's refusal to agree to the union's request for a contract provision for the check-off of union dues was not in good faith but solely to frustrate an agreement with the union, has power, as a remedy for that unfair labor practice, to order the employer to grant such a provision.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in the Appendix, *infra,* pp. 31–33.

STATEMENT

A. THE EARLIER PROCEEDINGS

In October 1961, the Union,[1] after winning a Board election, was certified as the representative of the production and maintenance employees at the Company's Danville, Virginia, plant (A. 44–45, 58, 116; 41, 15). Contract negotiations began shortly after the Union's certification and extended over the next five

[1] The United Steelworkers of America, AFL–CIO.

years, giving rise to two unfair labor practice cases against the Company (A. 58, 116–119; 17–19, 20–22, 41–42, 85).

In the first set of negotiations, which terminated in November 1962, the parties met 28 times without reaching an agreement (A. 45, 116; 17–18). Upon charges filed by the Union, the Board found that the Company had failed to bargain in good faith by, *inter alia*, refusing to agree to any provision for arbitration while insisting upon a no-strike clause, unilaterally changing conditions of employment, and refusing to meet at reasonable times (A. 45–46, 60, 116). The Board ordered the Company to cease its illegal conduct and to bargain in good faith. On July 17, 1964, the Court of Appeals for the Fourth Circuit summarily enforced the Board's order (A. 46, 116).

Meanwhile, in October 1963, following the Trial Examiner's decision in the first case, the parties resumed contract negotiations (A. 46; 17–19, 41–42). Over the next 11 months, 21 more meetings were held without arriving at a contract (A. 46, 116; 18–19, 42). It was not until the next-to-last meeting on August 25, 1964, that the Company finally withdrew its no-strike demand, and the Union, which had made concessions on a number of other issues, acceded to the Company's insistence that there be no arbitration provision in the contract (A. 60, 116–117; 20, 24). When this second round of negotiations broke off on September 10, 1964, three issues were still unresolved: wages, health insurance, and the Union's request for a deduction by the employer of union dues from the paychecks of

employees who authorized such a deduction ("check-off") (A. 46–47, 60–61, 116–117; 19).

There were about 302 employees in the bargaining unit, and they lived within a radius of 35 to 40 miles from the plant. The Union had no clerical staff in Danville; its closest office was in Roanoke, about 85 miles away. Accordingly, a checkoff was the only feasible means by which the Union could obtain prompt and regular collection of monthly dues. (A. 22–24.)

Dues checkoff had been discussed at virtually every bargaining session, and each time the Company rejected the Union's request for such a contract clause (A. 47; 21, 29). The Company concededly did not reject the checkoff because it was inconvenient or for any other business reason; it regularly made payroll deductions for savings bonds, insurance, the United Givers Fund, and a "Good Neighbor" fund at the Danville plant, and it had agreed to checkoff dues for other unions at its other plants (A. 47–48, 62–63; 26–30, 33, 35). The Company's chief negotiator admitted that he refused to agree to a checkoff, or to any proposal that would permit the Union to collect dues in nonworking areas of the plant, solely on the ground that the Company was "not going to aid and comfort the union" at this location in the conduct of "union business" (A. 47, 63; 32, 30, 21). Similarly, Company counsel acknowledged that "perhaps our refusal to grant the check-off clause has been harassment of the International Union * * *" (A. 16); "our purpose was that we were not going to aid and comfort the International Union at this location" (A. 36).

The Union again charged the Company with refusing to bargain in good faith, in violation of Section 8(a)(5) and (1) of the Act (A. 6–8, 41). On the basis of the above facts, the Board sustained the charge, adopting the Trial Examiner's finding that the Company's rejection of the checkoff was motivated by a desire to frustrate agreement with the Union (A. 49–51, 55–56). The Board again ordered the Company to cease and desist from the unfair labor practice found, and to bargain collectively with the Union upon request (A. 52–54, 56).

In May 1966, the Court of Appeals for the District of Columbia Circuit sustained the Board's unfair labor practice finding, and enforced its order (A. 57–78).[2] Although the court rejected the Union's suggestion that the order should include a specific reference to the Company's obligation with respect to the check-off, it noted that, in view of the finding that the Company's refusal was for the purpose of frustrating agreement with the Union, "[t]o suggest that in further bargaining * * * the company may refuse a check-off for some other reason, not heretofore advanced, makes a mockery of the collective bargaining required by the statute" (A. 66–67, n. 16).[3] The

[2] Judge Wilbur K. Miller dissented from this and the subsequent decisions of the court of appeals in this case.

[3] The court noted that the Trial Examiner had stated that his decision did not necessarily require the Company, in the resumed bargaining negotiations, to agree to some form of check-off (A. 51, n. 9). It concluded that this statement should be disregarded because it is inconsistent with the finding that "the company's refusual to grant a check-off was 'for the purpose of frustrating agreement with the Union and hence [the company had] engaged in bad faith bargaining'" (A. 66, n. 16).

court also found it unnecessary to provide in the order that the "union shall have the right to collect dues during non-working hours on non-working areas of the company premises," citing cases indicating that this right is guaranteed by Section 7 of the Act (A. 67, n. 18).[4] The Company's petition for a writ of certiorari was denied, 385 U.S. 851.

B. THE PRESENT PROCEEDING

When the contract negotiations were resumed, each side urged a different interpretation of the court of appeals' decree. The Company contended that the decree left it free to continue to refuse a checkoff provision provided it was willing to bargain about alternative methods of dues collection. The Union, on the other hand, asserted that the Company was obligated to agree to a checkoff provision (A. 118–119; 83–85). Thus, the Company continued to refuse a checkoff on the ground that this was "union business" (A. 84, n. 1), and proposed discussions concerning the possibility of making available a table in the payroll office for the collection of dues; while the Union argued that the court's opinion expressly recognized that employees have a statutory right to have dues collected in non-working areas of the plant during non-working hours, and that the checkoff provision was an additional and separate matter (A. 118–119; 103–104). Agreement was ultimately reached on all issues except the checkoff, and a contract was entered into effective

[4] *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793; *National Labor Relations Board* v. *Walton Mfg. Co.*, 289 F. 2d 177 (C.A. 5).

December 1, 1966 (A. 85, 91–92; Pet. Br. 8). The parties agreed to resolve the checkoff issue in accordance with the court's decree, but were unable to agree on what the decree meant (A. 85).

Accordingly, in February 1967, the Union filed a motion in the court of appeals for clarification of its enforcement decree (A. 81–87). The court initially denied the motion, suggesting that contempt proceedings would be a more appropriate means to test the Company's compliance with the decree (A. 109–110). When the Board declined to institute contempt proceedings, the Union renewed its motion to clarify the decree (A. 101–108). The court of appeals then granted the motion, issued a supplemental opinion, and remanded the case to the Board for reconsideration in light of that opinion (A. 115–130).

The court stated that it did not read "Section 8(d) as prohibiting the Board from ordering a company, which has repeatedly flouted its Section 8(a)(5) duty, to make meaningful and reasonable counteroffers, or indeed even to make a concession where such counteroffers or such a concession would be the only way for the company to purge the stain of bad faith that has already soiled its position" (A. 122). The court added: "Since the company had conceded that it had no business reason for refusing the checkoff, it would have been perfectly proper for the Board to order the company to grant one in return for a reasonable concession by the union on wages or insurance—the two issues besides checkoff that remained in dispute. Indeed, it is possible that in an

appropriate case the Board could simply order the company to grant a checkoff" (A. 123).

On remand, the Board concluded, in accordance with the court's rationale, that an order requiring the Company to grant a checkoff was warranted in the circumstances of this case (A. 135). The Board determined that since the Company's refusal to agree to a checkoff provision was motivated solely by an unlawful purpose, the Company should not be permitted to persist in its refusal in order to extract concessions from the Union on other issues (*ibid.*). Accordingly, the Board entered a supplemental order which included a requirement to grant a checkoff (A. 136–137). The court of appeals enforced that order (A. 140–141).

ARGUMENT

INTRODUCTION AND SUMMARY

The question presented here is whether—upon finding that an employer's rejection of a dues checkoff proposal, which clearly involves a term or condition of employment and thus is a mandatory bargaining subject, was not made in good faith, but was the latest step in a long-term scheme to frustrate agreement with the union—the Board may properly order the employer to grant the checkoff as a remedy for the violation of Section 8(a)(5). That question turns principally on the scope of the Board's remedial power under Section 10(c) to order such "affirmative action * * * as will effectuate the policies of this Act."

The appropriateness of the Board's remedy in this case must be assessed in the context of the Company's unfair labor practice and its effect on the collective bargaining relationship between the parties, which the Act primarily is designed to promote.

The record fully supports the finding of the Board and the court of appeals that the Company refused the checkoff solely to frustrate agreement with the Union. The evidence establishes both the Company's history of bad faith negotiations with the newly certified Union and its admitted lack of any valid reason for the refusal to check off union dues, which was confirmed by the fact that it made payroll deductions for other purposes at the Danville plant and had granted a checkoff to other unions at its other plants. Nor, it should be emphasized, did the Company ever seek a bargaining concession from the Union in return for a checkoff at Danville. Its chief negotiator frankly acknowledged that the Company had refused a checkoff or any proposal that would permit the collection of dues in the plant, solely on the ground that it was "not going to aid and comfort the union" at Danville. In view of all these circumstances, plus the fact that the special situation existing at the Danville plant (see p. 4, *supra*) made it unlikely that the Union would accept a contract without a checkoff provision, the Board was justified in concluding that the Company's rejection of the checkoff was motivated not by business considerations or considerations of bargaining strategy (see Pet. Br. 26) but solely by a desire to avoid reaching any agreement with the Union.

This case illustrates the difficulty faced by the National Labor Relations Board in fashioning an effective remedy to deal with an employer who repeatedly refuses to bargain with the Union about a particular subject, in a context where such refusal is motivated not by an economic or other valid justification but rather by the wish to avoid reaching any agreement with the Union. In the typical situation of an employer who refuses to bargain on the mistaken ground that he was not required to do so, an order directing him to bargain usually suffices to cure the violation; pursuant to such order the employer then bargains and thereby effectuates the statutory policy. Even in that situation, however, the Board is not limited merely to ordering an employer to bargain; where the employer has taken unilateral action in a situation that required prior bargaining, he may be directed to rescind that action and restore the *status quo* if necessary to make the bargaining meaningful. *Fibreboard Paper Products Corp.* v. *National Labor Relations Board,* 379 U.S. 203, 215–217.

The problem of devising an effective remedy is far more complex, however, where the employer concedes that the particular matter is a mandatory subject of bargaining, but nevertheless refuses to bargain about that subject solely because, as the Board found in this case, he desires to avoid an agreement with the union. If in such circumstances the Board merely enters its typical bargaining order, that remedy invites, as this case illustrates, another round of administrative and judicial proceedings in which the employer seeks to defend his continued recalcitrance

on the ground that his conduct, which was not sufficient to show good faith bargaining in the past, somehow suffices when it is done pursuant to a bargaining order. Such additional delay would undermine the statutory purpose of creating a viable environment wherein the parties to a labor dispute may resolve their differences through good faith bargaining.

In this exceptional type of case, the practical realities are that the only way in which the employer can now demonstrate his good faith is by giving the union what it seeks; for by definition we are dealing with a situation in which the employer has offered no valid justification for its refusal to make the concession. In the present case, for example, the employer was making other payroll deductions and had agreed to dues checkoffs with other unions at other plants; his sole asserted justification for refusing a dues checkoff here was that he was "not going to aid and comfort the union" at the Danville plant (A. 32).

Thus, since the Company's only reason for withholding a checkoff was to prevent agreement with the Union, the conventional remedy of ordering the Company to bargain in good faith, without more, would compound, rather than dissipate, the injury to the collective bargaining process caused by the Company's unfair labor practice. It would make "a mockery of the collective bargaining required by the statute," as the court of appeals stated (A. 67, n. 16), to permit the Company to return to the bargaining table with old or new

rationalizations for refusing the checkoff. The Company's conduct has placed it in a position where it can have no valid reason for withholding a checkoff at this time. In these circumstances, an order requiring the Company to grant a checkoff is a forthright and appropriate means of restoring the situation, as nearly as possible, to that which most probably would have obtained but for the Company's unfair labor practices. Moreover, such a remedy discourages the employer from unlawful conduct by depriving him, to the extent possible in a subsequent proceeding, of the advantage he sought to gain by attempting to frustrate the collective bargaining negotiations.

In this case the Board made its order precise and meaningful by specifying the action which the Company must take to satisfy its bargaining obligation, *i.e.*, it must demonstrate its good faith by agreeing to the Union's demand for a procedure that is widely accepted in industry and to which it had offered no valid objection. The contention is made, however, that such an order violates Section 8(d) of the Act, which, after defining the obligations that the duty to bargain collectively imposes upon employers and unions, states that "such obligation does not compel either party to agree to a proposal or require it to make a concession." That limitation upon the duty to bargain, however, is designed to prevent the Board from finding a refusal to bargain solely because of the refusal of one side or the other to make a concession. It does not control the different issue involved here of whether, when the refusal to bargain has been established the

Board may direct the employer to agree to a contract term where, as a practical matter, that is the only way he can demonstrate that he is now bargaining in good faith. In these exceptional circumstances, Section 8(d) does not bar such a remedy.

IN THE CIRCUMSTANCES OF THIS CASE, THE BOARD DID NOT EXCEED ITS AUTHORITY, UNDER SECTION 10(c) OF THE ACT, BY ORDERING THE COMPANY TO GRANT THE UNION A CHECKOFF PROVISION IN THE CONTRACT

A. THE BOARD'S SUPPLEMENTAL ORDER IS AN APPROPRIATE REMEDY FOR THE COMPANY'S UNFAIR LABOR PRACTICE

Section 10(c) of the Act empowers the Board, upon finding that an unfair labor practice has been committed, to order the respondent to cease and desist from the violation found and "to take such affirmative action * * * as will effectuate the policies of this Act." "This grant of remedial power is a broad one." *National Labor Relations Board* v. *Strong*, 393 U.S. 357, 359.[8] See also *National Labor Relations Board* v. *J. H. Rutter-Rex Mfg. Co.*, No. 32, this Term, decided December 15, 1969, slip opinion, p. 4. The Board may

[8] In *Strong*, the Court sustained a Board order requiring the employer retroactively to pay certain benefits provided for under a contract which he had unlawfully refused to sign. See also *Fibreboard Paper Products Corp.* v. *National Labor Relations Board*, 379 U.S. 203, 216 (employer ordered to resume maintenance work "contracted out" without bargaining with the union, and to reinstate affected employees with back pay); *National Labor Relations Board* v. *Newport News Shipbuilding & Dry Dock Co.*, 308 U.S. 241, 250 (disestablishment ordered of labor organization in whose formation employer had unlawfully interfered); *National Licorice Co.* v. *National Labor*

properly seek to restore "the situation, as nearly as possible, to that which would have obtained but for the [unfair labor practices]." *Phelps Dodge Corp.* v. *National Labor Relations Board,* 313 U.S. 177, 194. "The Board's order will not be disturbed 'unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.' *Virginia Elec. & Power Co.* v. *Labor Board,* 319 U.S. 533, 540." *Fibreboard Paper Products Corp.* v. *National Labor Relations Board,* 379 U.S. 203, 216.

The Board's order requiring the Company to grant the Union a checkoff provision is consistent with these principles. Since the Company's only reason for withholding a checkoff was to frustrate an agreement with the Union, it had placed itself in a position where the conventional order to bargain in good faith respecting

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Relations Board, 309 U.S. 350, 361–366 (employer ordered to cease giving effect to individual contracts secured through unfair labor practices, and to notify employees they were released from obligations imposed by those contracts); *Virginia Electric & Power Co.* v. *National Labor Relations Board*, 319 U.S. 533, 538–544 (dues paid to employer-dominated labor organization reimbursed to employees from whose wages they had been withheld under closed-shop, checkoff arrangement); *Int'l Ladies' Garment Workers' Union* v. *National Labor Relations Board*, 366 U.S. 731, 736, 739–740 (employer ordered to withdraw recognition from union that lacked majority support when originally recognized, and to cease giving effect to collective bargaining agreement executed with that union after it had secured a majority); *Franks Brothers Co.* v. *National Labor Relations Board*, 321 U.S. 702, and *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575, 610–613 (employer ordered to bargain with union, notwithstanding its loss of majority where such loss was attributable to the employer's unfair labor practices).

a checkoff was virtually meaningless; for the Company could not continue to resist a checkoff for the reasons presented before, which were found to have been offered in bad faith, and, as the court below observed, "[t]o suggest that in further bargaining the company may refuse a check-off for some other reason, not heretofore advanced, makes a mockery of the collective bargaining required by the statute" (A. 66–67, n. 16).[8]

Thus, this is not a case in which the Board has determined that bargaining for the inclusion or exclusion of a particular contract term is "*per se*" a violation of the Act. Cf. *National Labor Relations Board* v. *American National Insurance Co.*, 343 U.S. 395, 404–405. A mere refusal to agree to a dues checkoff is not unlawful, nor was that the basis of the decision here. See A. 123; *General Asbestos & Rubber Division, Raybestos-Manhattan*, 168 NLRB No. 54, 67 LRRM 1012, 1013–1014; *McLane Co.*, 166 NLRB No. 127, 65 LRRM 1729. Nor is this a case where the employer was willing to reach and sign an agreement with the union, but was found to have bargained in bad faith only with respect to the checkoff proposal. Cf. *United Steelworkers* v. *National Labor Relations Board* (*Roanoke Iron & Bridge Works, Inc.*), 390 F. 2d 846

[8] In the negotiations which occurred after the court of appeals' first decision enforcing a Board order which, in terms, only required the Company to bargain collectively with the Union, the Company continued to oppose a checkoff on the ground that it was "union business," essentially the same reason which it had advanced earlier; it offered merely to discuss proposals whereby the Union might collect dues in the plant during non-working time, a right which the Union could assert independently under Section 7 of the Act (*supra*, p. 6, and n. 4).

(C.A. D.C.), certiorari denied, 391 U.S. 904.[7] Rather, the Section 8(a)(5) violation found here reflected the employer's intent of avoiding any agreement with the Union; the Company's rejection of the checkoff was simply the latest means used to accomplish this objective (see A. 123). This conclusion is not altered by the fact that the parties subsequently entered into a contract without a checkoff provision, for they reserved their position on that issue pending a legal resolution of the controversy over the meaning of the court of appeals' decree (*supra*, pp. 6–7). See *Electrical Workers* v. *National Labor Relations Board*, 328 F. 2d 723, 726–727 (C.A. 3).

In the circumstances of this case, therefore, there were three alternative remedies available to the Board: (1) to require the Company to grant a checkoff pro-

[7] In that case, the Board found that the company had bargained in bad faith on the issue of the checkoff, although it was otherwise willing to reach an agreement with the union, and had, in fact, signed one. The Board premised its finding on evidence that the company refused to grant the checkoff because it believed that the union could not survive without a checkoff and hoped to destroy the union by denying it this benefit. Approving this finding, the court of appeals (Judge Burger dissenting) held: "Entering or conducting negotiations with the intent to destroy the other party would appear to be the archetypal example of a violation of the requirement that the parties must act in good faith." 390 F. 2d at 851. Judge Burger rejected this view of the evidence. However, he distinguished the instant case on the ground that here "there was a past history of findings of bad faith bargaining, and the trial examiner found that the refusal to agree to a checkoff was '*for the purpose* of frustrating agreement with the Union,' i.e., frustrating *any* agreement"; the reliance "on the lack of a valid reason for the refusal was directed toward the determination of whether the intransigence was designed to frustrate all negotiation." *Id.* at 854 (emphasis in original).

vision; (2) to require it to grant such a provision provided the Union offered a reasonable concession therefor; or (3) to enter a general order to bargain in good faith and attempt, through subsequent contempt proceedings, to compel the Company to take steps 1 or 2 (see Chamber of Commerce Br. 9–10).

The third alternative is the least satisfactory. If the grant of a checkoff is necessary to show good faith in the particular factual situation here, the interests of all parties would be better served by having the precise nature of the Company's obligation delimited in a Board order, rather than in the uncertain process of post-decree contempt proceedings.[8] Similarly, the imposition of such a specific affirmative remedy in the first instance by the Board is consistent with the congressional determination entrusting the formulation of remedies to the expertise of the administrative agency.[9] Indeed, it is pure formalism to suggest that a direct order to grant a checkoff contravenes the

[8] The Board declined to institute contempt proceedings because its original order did not specifically require the Company to grant a checkoff, and the court of appeals, in enforcing that order, had declined the Union's request to add such a requirement. The Board was doubtful whether, in these circumstances, either its order or the court's decree gave the Company sufficient notice that, in the subsequent negotiations, it was required to grant a checkoff provision. However, when the court of appeals, in its subsequent opinion, made plain that the Board could properly order a checkoff, the Board, agreeing that such a requirement was appropriate here, entered a revised order specifically requiring the Company to grant the Union a checkoff clause in the collective agreement.

[9] A contempt proceeding based on a general bargaining order is not an effective substitute for a Board order precisely delimiting the conduct required to undo the employer's previous violations of the Act. Where the "order imposes only a general good faith obli-

policies of the Act, while enforcement of exactly the same obligation through a contempt proceeding does not.

The second alternative, permitting the Company to extract a "reasonable concession" from the Union in exchange for the checkoff, would have interjected an element which the Company at no time had suggested was a ground for withholding agreement to a checkoff. The Company's agreement to a contract in December 1966, which resolved all of the outstanding issues between the parties except the checkoff, confirmed that, in the present case, the employer was not demanding any concession on the part of the Union as a *quid pro quo* for a checkoff. In these circumstances and in view of the unlawful purpose of the Company's refusal to agree to the checkoff, the Board was justified in concluding that it should not be permitted to continue its refusal in order to obtain concessions from the Union on other issues that already had been settled.

On balance, therefore, the Board reasonably determined that the first alternative—an unconditional checkoff requirement—was the best means of restoring the situation to that which would have obtained but for the Company's bad faith bargaining. Since the Company had no business justification for refusing a dues checkoff, and, indeed, had granted a checkoff to other unions at its other plants, it is probable that, except for its illegal motive, it would have agreed to

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gation, to establish contempt the Board must prove that since the order's enforcement the guilty party has again exhibited the elusive characteristics of 'subjective bad faith.'" Note, *The Need For Creative Orders Under Section 10(c) of the National Labor Relations Act*, 112 U. Pa. L. Rev. 69, 85 (1963).

a checkoff provision here. The validity of this assumption is reinforced by the fact, noted by the court of appeals, that a checkoff is generally "of no consequence whatsoever to the employer," and thus such provisions are "included in 92 per cent of all manufacturing industries labor contracts" (A. 128–129). Cf. *National Labor Relations Board* v. *Katz,* 369 U.S. 736, 747 (unilateral action by an employer "will rarely be justified by any reason of substance").

To be sure, the probability that the Company would have granted a checkoff provision had it originally bargained in good faith is not as high as it is where an employer has agreed to certain contract benefits and then unlawfully refuses to execute the contract. See *H. J. Heinz Co.* v. *National Labor Relations Board,* 311 U.S. 514; *National Labor Relations Board* v. *Strong,* 393 U.S. 357. However, where unfair labor practices have been committed, it is not always possible to say with absolute assurance what the situation would have been absent the illegal action. In such cases, the Board must of necessity make a determination based upon probabilities to restore "the situation, *as nearly as possible,* to that which would have obtained but for the [unfair labor practices]" (*Phelps Dodge Corp., supra,* 313 U.S. at 194, emphasis added). Its judgment will be accepted so long as it has a reasonable basis in experience and it effectuates the policies of the Act. See *National Labor Relations Board* v. *Seven-Up Bottling Co.,* 344 U.S. 346.

Thus, in *Fibreboard Paper Products Corp.* v. *National Labor Relations Board,* 379 U.S. 203, the employer, without first bargaining with the union,

contracted out the work of about 70 maintenance employees in the expectation of saving about $225,000 annually in labor costs. The Board, as a remedy for the refusal to bargain, ordered the employer, *inter alia*, to terminate its contract, to resume the maintenance work by its employees, and to offer the terminated employees reinstatement with back pay. The employer challenged the order on the ground that, in view of the large economic savings effected by the contract, it was extremely unlikely that management would have agreed not to contract out the work even had it bargained with the union, and, therefore, that the order was unduly burdensome. The Court sustained the order, however, finding no basis for disturbing the Board's conclusions that "restoring the *status quo ante* [was necessary] to insure meaningful bargaining" and that its "order would not impose an undue or unfair burden" on the employer. 379 U.S. at 216.

In the present case, on the other hand, nothing is required of the Company other than to grant a checkoff, which was withheld only for an unlawful purpose and without economic justification. Moreover, it certainly is more probable—given the finding that the checkoff was withheld solely to prevent agreement—that the Company would have agreed to a checkoff had it been bargaining in good faith, than it is that the employer in *Fibreboard* would have agreed to forgo the economic savings effected by contracting-out had he bargained with the union before taking that action.

The Board's supplemental order in this case may be justified as an appropriate exercise of the Board's remedial power not only on the ground that it is reasonably calculated to restore the likely *status quo*, but also because it is a reasonable means of fully eradicating the effects of the Company's unlawful refusal to bargain. The Company has engaged in a protracted effort to undermine the Union, which was inevitably weakened by the five-year delay in securing a contract. The checkoff remedy not only removes that issue as a justification for a continuing refusal to agree to a contract, but it also serves to discourage such unlawful conduct by depriving the Company of some of the advantage which it gained by unlawfully weakening the Union. Although the employees must still voluntarily authorize the checkoff, the availability of a contractual checkoff procedure may, in some measure, restore the Union's stature with the employees as their elected statutory representative, and provide it with the prompt and regular flow of dues needed to maintain a vigorous grievance procedure.[10] The courts of appeals have consistently sustained requirements in Board orders which go beyond what a respondent would have agreed to in collective bargaining where they are appropriate and necessary fully to eradicate the effects of the unfair labor practices found.[11]

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[10] See p. 4, *supra*.

[11] See, *e.g.*, *Int'l Union of Electrical Workers* v. *National Labor Relations Board* (*Scott's, Inc.*), 383 F. 2d 230, 232, n. 4 (C.A. D.C.), certiorari denied, 390 U.S. 904 (employer required to assemble its employees on company time and expense, to

The Company disputes this rationale, contending (Br. 21) that, to the extent that the order has the effect of restoring the Union's status, it is directed to the protection of union interests rather than employee rights. But the employees chose this Union to represent them and the Company unlawfully sought to undermine their choice from the outset. An order remedying that violation by enabling the Union to regain its strength plainly vindicates the employees'

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allow the union to give a presentation of its position); *J. P. Stevens & Co.* v. *National Labor Relations Board*, 406 F. 2d 1017, 1022–1024 (C.A. 4) (employer required to furnish employees' names and addresses to union seeking to organize plants, to facilitate union communication with employees); *Textile Workers Union* v. *National Labor Relations Board* (*J. P. Stevens & Co.*), 388 F. 2d 896, 904–905 (C.A. 2), (employer required to allow union access to company bulletin boards, and to assemble the employees during worktime so that the Board's notice may be read to them); *J. P. Stevens & Co.* v. *National Labor Relations Board*, 72 LRRM 2433, 2434 (C.A. 5), October 3, 1969 (employer required: (1) to give union access to the company bulletin boards for a year; (2) to furnish union a list of names and addresses of all company employees working in plants where the violations occurred; (3) to mail the Board's notice to employees' homes; and (4) to assemble the employees during worktime to have the notice read to them); *Montgomery Ward & Co.* v. *National Labor Relations Board*, 339 F. 2d 889, 894–895 (C.A. 6) (employer barred, in the period prior to a Board election, from making anti-union speeches during working hours on his premises without according the union a similar opportunity to address the employees); *National Labor Relations Board* v. *Elson Bottling Co.*, 379 F. 2d 223, 226–227 (C.A. 6) (employer required to allow union access to company bulletin boards, and an opportunity to address the employees on plant premises in the event of any subsequent anti-union speech by the employer).

right to choose their own representative.[12] Chief Judge Brown stated the correct principle in rejecting a similar contention—i.e., that the "obvious and unabashed objective behind this 'remedy' is to aid the Union in organizing Stevens' employees * * *" (*J. P. Stevens, supra,* n. 11, 72 LRRM at 2438):

> That it may be. But so is a publicized cease and desist order or wild-fire awareness of a reinstatement and backpay order for four employees. See *Stevens II* [*Textile Workers Union of America* v. *National Labor Relations Board,* 388 F. 2d 896] at 905–906 [C.A. 2]. On the surface, this may appear to be making the lot of the Union easier. But, it is being made easier solely because the employer has made that lot *harder* than the law tolerates.

B. THE BOARD'S SUPPLEMENTAL ORDER DOES NOT CONTRAVENE SECTION 8(D) OF THE ACT

The Company's principal contention (Br. 12–14) is that, by ordering it to grant a checkoff provision, the Board has compelled it to agree to a proposal or to

[12] Cf. *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575, 610–611: "If the Board could enter only a cease-and-desist order and direct an election or a rerun, it would in effect be rewarding the employer and allowing him 'to profit from [his] own wrongful refusal to bargain.' *Franks Bros., supra,* at 704, while at the same time severely curtailing the employees' right freely to determine whether they desire a representative. The employer could continue to delay or disrupt the election processes and put off indefinitely his obligation to bargain; and any election held under these circumstances would not be likely to demonstrate the employees' true, undistorted desires." [Footnotes omitted.]

make a concession, in violation of Section 8(d). It relies on the decisions of this Court in *National Labor Relations Board* v. *American National Insurance Co.*, 343 U.S. 395, and *National Labor Relations Board* v. *Insurance Agents' Int'l Union*, 361 U.S. 477.

The qualifying language in Section 8(d) (*infra*, p. 32) precludes the Board, in determining whether there has been a refusal to bargain in good faith, from drawing an inference of bad faith solely because one party has not agreed to the other's proposals or made a concession, or because the Board believes that a party's bargaining proposals are unreasonable. However, the substance of the bargaining proposals is not wholly irrelevant even to that issue, for as Judge Magruder has pointed out, "if the Board is not to be blinded by empty talk and by the mere surface motions of collective bargaining, it must take some cognizance of the reasonableness of the positions taken by an employer in the course of bargaining negotiations." *National Labor Relations Board* v. *Reed & Prince Mfg. Co.*, 205 F. 2d 131, 134 (C.A. 1), certiorari denied, 346 U.S. 887. Similarly, this Court recognized in *Insurance Agents', supra*, 361 U.S. at 486, that: "Obviously there is tension between the principle that the parties need not contract on any specific terms and a practical enforcement of the principle that they are bound to deal with each other in a serious attempt to resolve differences and reach a common ground." See also Cox, *The Duty to Bargain in Good Faith*, 71 Harv. L. Rev. 1401, 1419–1422 (1958).

In fashioning appropriate remedies under Section 10(c) of the Act, the Board must take into account

the policy of Section 8(d). The Board could not use its remedial power to compel a party to agree to a contract proposal which it was lawfully opposing and which is unrelated to the unfair labor practice found. But, where, as here, the Board has found on ample evidence, that a party has taken a bad faith or otherwise impermissible [13] bargaining position, the freedom of contract policy embodied in Section 8(d) is not contravened by requiring the party to give up that illegal position, or, where consent to a particular proposal has been withheld solely for a bad faith reason, by requiring acceptance of that proposal. Nothing in Section 8(d) permits a party to refuse to agree to a proposal for a reason which violates the statute. In these circumstances, where the contract proposal is not of the type which ordinarily would be modified as a result of further negotiations and, indeed, it is clear that the party has no valid reason for opposing it, to compel acceptance of the proposal is not to force a concession in violation of Section 8(d).[14] See Note, *Forced Concession*

[13] See *National Labor Relations Board* v. *Borg-Warner Corp.*, 356 U.S. 342 (insistence on subjects outside the area of mandatory bargaining); cf. *National Labor Relations Board* v. *Katz*, 369 U.S. 736 (unilateral changes in mandatory bargaining subjects while contract negotiations are in process).

[14] Contrary to the Company's contention (Br. 15), there is no inconsistency between the Board's present position and the position which it took in opposition to the Company's petition for certiorari to review the decision of the court of appeals sustaining the Board's original order. To be sure, the Board pointed out that that order did not, in terms, require the Company to agree to a checkoff (Br. in Opp., No. 392, O.T. 1966, p. 7). However, the Board added that the Company's past refusals to bargain might have put it in a position that it could demonstrate its good faith only by making a concession on the subject of checkoff. The Board concluded that, even in that

as a Possible NLRB Remedy, 68 Colum. L. Rev. 1192, 1195–1196, 1199 (1968).

The court of appeals thus correctly rejected the Company's argument on the ground that "Section 8(d) defines collective bargaining and relates to the determination of *whether* a Section 8[a](5) violation has occurred and not to the *scope* of the remedy which may be necessary to cure violations which have already occurred" (A. 123). This rationale is not inconsistent with the prior decisions of this Court on which the Company relies.

In *American National Insurance, supra*, the Court stated that "the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements." 343 U.S. at 404. However, the Court was not concerned with whether the Board had devised an appropriate remedy under Section 10(c), but rather with the question whether the Board had properly found a refusal to bargain in good faith in violation of Section 8(a)(5). It held that the Board's finding that the employer's insistence on a management function clause was *per se* a violation of Section 8(a)(5) constituted a judgment on the reasonableness of the employer's bargaining proposal and therefore was contrary to the express command of Section 8(d). As shown (*supra*, p. 9), the unfair labor practice finding here does not rest on *per se* grounds.

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event, its order would not violate Section 8(d), since the concession would result from the fact that the Company's "own 'performance at the bargaining table' made such a concession the only convincing way by which it could demonstrate its good faith" (*id.*, at pp. 7–8).

Insurance Agents' similarly did not involve a remedial question, but rather a determination whether there was a violation of the collective bargaining obligation by a labor organization.[15] The precise question presented was "whether the Board may find that a union, which confers with an employer with the desire of reaching agreement on contract terms, has nevertheless refused to bargain collectively * * * solely and simply because during the negotiations it seeks to put economic pressure on the employer to yield to its bargaining demands by sponsoring on-the-job conduct designed to interfere with the carrying on of the employer's business" (361 U.S. at 479). The Court answered that question in the negative; it concluded, *inter alia*, that, if "the Board in the guise of determining good or bad faith in negotiations could regulate what economic weapons a party might summon to its aid * * *, it would be in a position to exercise considerable influence upon the substantive terms on which the parties contract" (*id.*, at 490). No similar problem is involved here, since the Board's finding that the Company withheld a checkoff in bad faith was not based on any judgment respecting the bargaining strength or economic weapons utilized by the parties, but rather on evidence which fully warranted the conclusion that the Company was solely motivated by a desire to prevent an agreement with the Union.[16]

[15] Section 8(b)(3) of the Act imposes on a labor organization the same duty to bargain in good faith with the employer as Section 8(a)(5) imposes on the employer respecting negotiations with the employees' representative.

[16] The other cases cited by the Company (Br. 17) are similarly distinguishable. *National Labor Relations Board* v.

In sum, the requirement that the Company in the present case must agree to a checkoff provision is not attributable to any judgment by the Board that checkoff is beneficial in this particular labor-management relationship—the evil which the "concession" clause in Section 8(d) sought to guard against. Rather, it results from the fact that the Company, by its prior bad faith bargaining on that issue, left itself with no lawful reason for continuing to withhold a checkoff. In these particular circumstances, to require the grant of a checkoff is, as we have shown, an appropriate exercise of the Board's remedial authority under Section 10(c) of the Act.[17]

American Aggregate Co., 335 F. 2d 253 (C.A. 5), *National Labor Relations Board* v. *Lewin-Mathes Co.*, 285 F. 2d 329 (C.A. 7), and *National Labor Relations Board* v. *United Clay Mines Corp.*, 219 F. 2d 120 (C.A. 6), all involve the evidentiary determination whether an employer's bargaining was in bad faith. *Retail Clerks International Ass'n* v. *National Labor Relations Board*, 373 F. 2d 655 (C.A. D.C.), involved the factual question whether an agreement had been reached between the employer and union, which the employer then refused to sign.

[17] See also *National Labor Relations Board* v. *Beverage-Air Co.*, 402 F. 2d 411, 417, enforcing 164 NLRB 1127 (union given option of requiring extension of the term of a contract which had expired by the time the employer's unlawful refusal to execute it had been adjudicated); cf. *National Labor Relations Board* v. *Warrensburg Board & Paper Corp.*, 340 F. 2d 920, 925 (C.A. 2); *Local 80, Sheet Metal Workers (Turner-Brooks, Inc.)* 161 NLRB 229, 237–238, 239 (as a remedy for the union's unlawful insistence on inclusion of an industry promotion fund clause in the collective agreement, union ordered to cease and desist from enforcing the industry promotion fund provisions of the contract and from insisting that the employer make payments into that fund).

CONCLUSION

For the reasons stated the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et. seq.*) are as follows:

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, * * *

SEC. 8. (a) It shall be an unfair labor practice for an employer—

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a);

* * * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the

employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession * * *.

* * * * *

SEC. 10(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

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